Tan Sri Dato' Hj Lamin bin Hj Mohd Yunus v Bursa Malaysia Securities Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–3683 OF 2010

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LOW HOP BING, ABU SAMAH AND LINTON ALBERT JJCA
2 MARCH 2012

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Companies and Corporations — Directors — Duties — Obligations of director to comply with Bursa Malaysia's Listing Requirements ('the LR') — Whether director discharged his obligations under LR — Whether director's duties under LR abolished or extinguished by appointment of provisional liquidator — Companies Act 1965 s 233(1)

D

The appellant was a director of Golden Plus Holdings Bhd ('the company'), a company listed as a member of Bursa Malaysia Securties Bhd ('the respondent'). The respondent was an exchange-holding vested with statutory duties to maintain and promote the interests of members of the public dealing on the Stock Exchange. On 18 July 2008 the respondent issued a notice to show cause to the appellant for alleged breaches of Bursa Malaysia's Listing Requirements ('the LR'). The allegations of breach against the appellant were essentially for delays in the submission of accounts for 2007 and 2008. There was a hearing before Bursa's Listing Committee ('the LC') in respect of these breaches. The LC held that the appellant had breached the LR. The appellant appealed to the Appeals Committee ('the AC') against the decision of the LC but the AC dismissed the appellant's appeal. The appellant then applied for a judicial review of the respondent's decision, which was dismissed by the High Court. This was the appeal against that decision of the High Court. It was agreed that the outcome of this appeal would bind the five other appeals pending before this court, which pertain to the same issue. In this appeal the appellant submitted that with the appointment of the provisional liquidator for the company, the director's duties including those under the LR were extinguished. Therefore, it was the appellant's contention that only the provisional liquidator was required to comply with the duties stated in the notice to show cause. The respondent responded that the appellant's duties as director under the LR subsisted notwithstanding the appointment of the provisional liquidator.

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Held, dismissing the appeal with costs of RM10,000 in respect of each of the six appeals (global sum of RM60,000):

(1) The director's duties under the LR, which were owed not only to the

respondent but also to the investing public, had statutory force and were distinct and separate from his duties under the Companies Act 1965 ('the Act') (see paras 23–25).

(2) Upon a true construction of s 233(1) of the Act, it was abundantly clear that the director's duties were not abolished or extinguished by the appointment of the provisional liquidator. The director's duties, which existed before the appointment of the provisional liquidator, continued by way of residuary obligations. The facts of the present case revealed that the appellant and other directors of the company had continued to make various announcements for the company. The appellant and other directors had also met with external auditors for extension of time to comply with the LR. As such, the appellant could not take the position that his duties were extinguished by virtue of the appointment of the provisional liquidator. Thus, there was no merit in this appeal (see paras 26–29).

[Bahasa Malaysia summary

Perayu adalah pengarah Golden Plus Holdings Bhd ('syarikat'), syarikat yang disenarai sebagai ahli Bursa Malaysia Securties Bhd ('responden'). Responden adalah bursa-induk yang diletakhak dengan tugas-tugas statutori untuk mengekalkan dan mempromosi kepentingan ahli-ahli orang awam yang berurusan dengan Bursa Saham. Pada 18 Julai 2008 responden mengeluarkan notis untuk menunjukkan sebab kepada perayu untuk kemungkiran yang didakwa terhadap Keperluan Penyenaraian Bursa Malaysia ('KP'). Dakwaan-dakwaan kemungkiran terhadap perayu pada dasarnya untuk kelewatan dalam pengemukaan akaun untuk tahun-tahun 2007 dan 2008. Terdapat pendengaran di hadapan Jawatankuasa Penyenaraian Bursa ('JP') berkaitan kemungkiran ini. JP memutuskan bahawa perayu telah memungkiri KP. Perayu merayu kepada Jawatankuasa Rayuan ('JR') terehadap keputusan JP tetapi JR menolak rayuan perayu. Perayu kemudiannya memohon untuk semakan kehakiman keputusan responden yang mana ditolak oleh Mahkamah Tinggi. Ini adalah rayuan terhadap keputusan Mahkamah Tinggi. Ia dipersetujui bahawa keputusan rayuan ini akan mengikat lima rayuan lain yang masih belum selesai di hadapan mahkamah ini, yang berkaitan dengan isu yang sama. Dalam rayuan ini perayu berhujah bahawa dengan pelantikan likuidator sementara untuk syarikat, tugas-tugas pengarah termasuk tugas-tugas di bawah KP dibatalkan. Oleh itu, adalah hujahan perayu bahawa hanya likuidator sementara dikehendaki untuk mematuhi dengan tugas-tugas yang dinyatakan di dalam notis untuk menunjukkan sebab. Responden menjawab bahawa tugas-tugas perayu sebagai pengarah di bawah KP wujud walaupun terdapat pelantikan likuidator sementara tersebut.

Diputuskan, menolak rayuan dengan kos RM10,000 berkaitan keenam-enam rayuan (jumlah global RM60,000):

(1) Tugas-tugas pengarah di bawah KP yang terhutang bukan sahaja kepada

responden tetapi juga kepada pelabur awam, mempunyai penguatkuasaan statutori dan adalah berbeza dan berasingan daripada tugas-tugasnya di bawah Akta Syarikat 1965 ('Akta') (lihat perenggan 23–25).

(2) Atas tafsiran sebenar s 233(1) Akta, adalah jelas bahawa tugas-tugas pengarah tidak dimansuhkan atau dibatalkan dengan pelantikan likuidator sementara tersebut. Tugas-tugas pengarah yang mana wujud sebelum pelantikan likuidator sementara, berterusan melalui tanggungjawab bakian. Fakta kes ini menunjukkan bahawa perayu dan pengarah lain syarikat telah meneruskan membuat pelbagai pengumuman untuk syarikat. Perayu dan pengarah lain juga berjumpa dengan juruaudit luaran untuk memohon pelanjutan masa bagi mematuhi KP tersebut. Oleh itu, perayu tidak dapat berhujah bahawa tugas-tugasnya telah dibatalkan berdasarkan pelantikan likuidator sementara tersebut. Dengan itu, tidak terdapat merit dalam rayuan ini (lihat perenggan 26–29).]

Notes

For cases on duties, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 226–248.

Legislation referred to

Capital Markets and Services Act 2007 s 11
Companies Act 1965 s 233(1)
Rules of the High Court 1980 O 53 r 4(1), (2)

Maniam Raju (Krish Maniam & Co) for the appelant.
Lim Chee Wee (Kwan Will Sen with him) (Skrine) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

INTRODUCTION

[1] This appeal raises a question of law of immense importance to the corporate community in general, and the capital markets and services in particular.

[2] On 2 October 2009, the respondent's appeals committee upheld the decision of its listing Committee and meted out a public reprimand and imposed a fine of RM17,200 on the appellant ('the director') for breaching Bursa Malaysia's listing requirements ('the LR') (a reference hereinafter to a paragraph is a reference to that paragraph in the LR).

[3] The director then took out a notice of motion under O 53 r 4(1)–(2) of

the Rules of the High Court 1980 for judicial review to issue an order of certiorari to quash the decision of the Appeals Committee.

[4] The learned judge of the High Court dismissed the said notice of motion. Hence, this appeal by the director against the High Court decision.

[5] Parties have agreed that the outcome of this appeal shall bind five other appeals viz W-02–3684 to 3688 of 2010 now before us (collectively,'the appeals').

FACTUAL BACKGROUND

[6] The factual background leading to the instant appeal is not in dispute.

[7] On 28 June 2006, the director was appointed as an Independent Non-Executive Director of Golden Plus Holdings Bhd ('GPIus'), a listed member and issuer of the respondent, Bursa Malaysia Securities Bhd ('Bursa Malaysia').

[8] Bursa Malaysia is a public company incorporated under the Companies Act 1965 and is a stock exchange. Under s 11 of the Capital Markets and Services Act 2007, Bursa Malaysia has a statutory duty to ensure an orderly and fair market in the securities traded through its facilities. For this purpose, Bursa Malaysia issues, monitors and enforces various rules, regulations and requirements, including the LR, to bind its members and the members' directors.

[9] Vide court order dated 27 March 2008, a provisional liquidator ('PL') was appointed for GPIus.

[10] On 18 July 2008, Bursa Malaysia issued a notice to show cause to the director, alleging the following breaches:

(a) under para 9.23(b), for failing to submit GPIus' annual audited accounts for the financial year ended 31 December 2007 ('AAA 2007') on or before 30 April 2008. This was only submitted on 21 August 2008;

(b) under para 9.23(a), for failing to submit GPIus' annual report for the financial year ended 31 December 2007 ('AR 2007') on or before 30 June 2008. This was only submitted on 28 August 2008;

(c) under para 9.22(1), for failing to submit GPIus' quarterly report for the financial period ended 31 March 2008 ('QR 1/2008') on or before 31 March 2008. This was only submitted on 3 September 2008; and

(d) under para 9.22(1), for failing to submit GPIus' quarterly report for the financial period ended 30 June 2008 ('QR 2/2008') on or before 31 August 2008. This was only submitted on 9 October 2008.

[11] Paragraph 16.11 expressly provides that a director of a listed issuer must not:

(a) cause, aid or abet a breach of the LR by such listed issuer; or

(b) permit, either knowingly or where he had reasonable means of obtaining such knowledge, a listed issuer to commit a breach of the LR.

[12] The director was required to show cause by making a written submission supported by documentary evidence, if any, to Bursa Malaysia as to why Bursa Malaysia should not find the director to be in breach of:

(a) para 16.11(a), for causing the company's failure to submit:

(i) the AAA 2007;

(ii) the AR 2007;

(iii) the QR 1/2008; and

(iv) the QR 2/2008; and/or

(b) para 16.11(b), for permitting, either knowingly or where the director has reasonable means of obtaining such knowledge, the company's failure to submit:

(i) the AAA 2007;

(ii) the AR 2007;

(iii) the QR 1/2008; and

(iv) the QR 2/2008.

[13] On 12 February 2009, the listing Committee deliberated, and, on 25 March 2009, decided, inter alia, that the director had breached para 16.11(a) and/or (b).

[14] Against the decision of the listing Committee, the director vide solicitors' letters dated 2–3 April 2009 appealed to the Appeals Committee.

[15] On 2 October 2009, the Appeals Committee dismissed the director's appeal.

[16] Subsequently, the director's notice of motion for judicial review was dismissed by the High Court.

[17] The director's appeal against the High Court decision is now before us.

QUESTION FOR DETERMINATION

[18] For the purpose of obtaining an order for judicial review in the court of first instance, learned counsel for the director and Bursa Malaysia had focused their respective submissions on contract, corporate and company law, in particular, relating to the appointment of the PL, consequential legal implications, contractual rights and obligations of the director as well as frustration of contract.

[19] To elaborate, learned counsel Mr Maniam Raju submitted for the director that with the appointment of the PL for GPIus, the director's duties including those under the LR are abolished or extinguished, in which case, only the PL is required to comply with the duties stated in the notice to show cause.

[20] Mr Lim Chee Wee (Mr Kwan Will Sen with him) responded that the director's duties under the LR subsisted notwithstanding the appointment of the PL.

[21] The learned High Court judge considered wholly and exclusively the aforesaid submissions and, on those premises, agreed with the views ventilated for Bursa Malaysia and dismissed the director's application.

[22] Having carefully considered the grounds of judgment of the learned judge and counsel respective submissions, we identify the question for determination as follows:

> Does the appointment of the PL for GPIus exonerate the Director from the Director's duties (which existed before the said appointment) to comply with the requirements of Bursa Malaysia set out in para 16.11(a) and (b) read with para 9.23(b) relating to the submission of annual audited accounts for GPIus; para 9.23(a) relating to the submission of annual report; and para 9.22(1) relating to the submission of quarterly reports?.

[23] At the outset, we must stress that the LR has statutory force in the form of rules containing obligations and requiring compliance by participating organisations pursuant to the Capital Markets and Services Act 2007.

[24] The director's duties are set out generally in the LR, and in para 2.04(2) specifically ie 'A listed issuer, its directors must comply with these requirements for so long as the listed issuer shall remain on the official list. This applies even

during periods when a listed issuer's securities are suspended from trading. These duties are owed not only to Bursa Malaysia but also to the investing public.

[25] The director's duties under the LR are distinct and separate from his duties under the Companies Act 1965. His duties under the LR, being statutory in nature, are not displaced by the doctrine of frustration of contract. Such doctrine may apply to GPIus and the director inter se, but is inapplicable to the director's statutory duties under the LR.

[26] In this regard, we are mindful of s 233(1) of the Companies Act 1965 which in essence provides for the legal implications consequent upon the appointment of eg a provisional liquidator. It reads as follows:

> *Custody and vesting of company's property*
>
> 233(1) *Where a* winding up order has been made or a *provisional liquidator has been appointed, the* liquidator or *provisional liquidator shall take into his custody or under his control all the property and things in action to which the company is or appears to be entitled.* (Emphasis added.)

[27] Upon a true construction of s 233(1), it is abundantly clear to us that it does not, either expressly or by necessary implication, provide for the abolition or extinguishment of the director's duties which existed before the appointment of the PL. The director's duties continue by way of residuary obligations. In these appeals, the facts reveal that the director(s) and GPIus had actually continued to make various announcements for GPIus. Pursuant to letters dated 29 May 2008, 25 July 2008 and 19 September 2008, the director(s) and GPIus confirmed the director's role requiring compliance with the LR. The director(s) had meetings with external auditors and indeed wrote to Bursa Malaysia on 29 April 2008 and 22 May 2008 for extension of time to comply with the LR.

[28] In the circumstances, the director cannot take the position that such prior duties are abolished or extinguished by virtue of the appointment of the PL. In other words, the appointment of the PL does not exonerate the director from his duties prescribed in the LR.

CONCLUSION

[29] On the foregoing grounds, we answer the above question in the negative. We hold that the learned judge was correct in her decision. We find no

merits in these appeals which we hereby dismiss with costs of RM10,000 in respect of each appeal, amounting to a global sum of RM60,000 for the six appeals.

[30] Decision of the High Court is affirmed.

[31] Deposit to Bursa Malaysia (the respondent) on account of the fixed costs.

Appeal dismissed with costs of RM10,000 in respect of each of the six appeals (global sum of RM60,000).

Reported by Kohila Nesan